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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 351

EMIL STEIN AND WILLIAM B. STEIN,
Petitioners and Appellants below,

vs.

PRESTON DELANO, Comptroller of the Currency, and L. M. REED, Substituted Receiver of the New Jersey National Bank and Trust Company of Newark, New Jersey,
Respondents and Appellees below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, EMIL STEIN and WILLIAM B. STEIN, respectfully show:

I.

Summary Statement of the Matter Involved.

The within application for a writ of certiorari is prosecuted to review a judgment of the United States Circuit

Court of Appeals for the Third Circuit entered July 17, 1942 (R. 28a), affirming a judgment entered in the United States District Court for the District of New Jersey on January 19, 1942, dismissing petitioners' application for costs and counsel fees to be taxed against the fund in the possession of respondents (R. 25a). The fund and this litigation arose out of the receivership of a national bank.

The fund in question (over $500,000.00) had been brought under the practical control of the district court through the efforts of petitioners' counsel, who, realizing at the inception of this litigation that unless the fund was in existence at the conclusion thereof, their efforts to test the legal questions involved would be purely academic. Accordingly, at the outset, an application for the appointment of a custodial receiver or trustee of the fund was pressed, and resulted in a stipulation by respondents in open court on March 18, 1940 (R. pp. 13a-14a) to the effect that distribution of the fund would await the final determination of the conflicting claims against it, and that the respondents would

> "* * * preserve intact the funds available for distribution to stockholders or creditors until the question of who is entitled to said funds shall have been determined."

A consideration of the basic questions on this application necessitates a brief review of the background of the underlying litigation:

The New Jersey National Bank and Trust Company of Newark, N. J., suspended banking operations in June, 1932, when the Comptroller of the Currency appointed a receiver

to take over its assets. An assessment of 100% upon the outstanding capital stock of $2,800,000 was levied, and over $1,000,000 was collected from the stockholders.

From the liquidation of the bank's assets and the collection of the stockholders assessments, the successive receivers appointed by the Comptroller of the Currency paid dividends to the depositors from time to time, until shortly prior to the institution of this suit the depositors had received and accepted their "fifth final principal dividend" making a total of 100% of the principal amount of their deposits.

The payment of the final principal dividend left approximately $750,000 in liquid assets (of which about $500,000 was in cash) in the possession of the comptroller and his receiver. They threatened to pay this money to the depositors as "interest upon their deposits".

Petitioners, as stockholders, who had either paid or were being held liable for their respective assessments, consulted counsel, and were advised that under the law of New Jersey the acceptance of the principal of a debt destroys the right to claim interest thereon for delay in payment, in the absence of an *express* contract; that the relationship between a bank and its depositor was that of simple debtor and creditor without any express contract to pay interest on deposits; and that in counsel's opinion, *Erie R. R.* v. *Tompkins*,[1] and the cases interpreting it, required the application of New Jersey local law in determining whether the depositors were entitled to interest after accepting the principal of their deposits in full.

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[1] 304 U. S. 64.

Accordingly, petitioners conceived that whatever the law was prior to *Erie R. R.* v. *Tompkins, supra*—and there appeared to be only one authority in the Supreme Court allowing moratory interest in national bank receiverships notwithstanding the acceptance of the full principal of a deposit[1]—it was no longer applicable. Just as local statutes of limitation were held to fix the periods within which a national bank assessment could be sued upon,[2] it was deemed that local New Jersey law would apply to the issues in the case at bar. While it was true that jurisdiction of the federal court was not based upon diversity of citizenship, it was felt that the doctrine of *Erie* v. *Tompkins* was not to be limited in its application to diversity cases only. A subsequent decision of this court lends considerable justification for maintaining that view.[3]

Suit was thereupon begun by petitioners on their own behalf, and on behalf of all the other stockholders and the bank itself, to determine the legal ownership of the fund remaining in the possession of respondents after payment to, and acceptance by, the depositors of 100% of their claims. Other stockholders promptly intervened and when the issue was submitted to the District Court, petitioners represented the owners of 8,778 shares of stock.

Upon the filing of the complaint which charged that the remaining assets in the possession of respondents constituted a trust fund for the benefit of the bank and its stockholders, the District Court allowed an order directed to the defendants to show cause among other things, why,

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1 *Nat'l Bk.* v. *Mechanics Nat'l Bk.*, 94 U. S. 437 (1876).
2 *Rawlings* v. *Ray*, 312 U. S. 96.
3 See *D'Oench, etc.* v. *F. D. I. C.*, 86 Law Ed. Adv. Op. No. 206—March 2, 1942.

pendente lite, a receiver or trustee should not be appointed of the fund in question. Upon the return day, counsel for the respective parties—the Comptroller being represented by a member of the legal staff of the Washington office—conferred before the argument, and agreed as follows:

1—that the "interest question" raised by petitioners was one with which the respondents were vitally concerned, and one upon which they were desirous of having a current U. S. Supreme Court ruling—the last decision in point having been rendered about 75 years ago, and *Erie R. R.* v. *Tompkins, supra,* having created new approaches with possible drastic changes in results (R. 11a);

2—that in consideration of petitioners not pressing for the appointment of a receiver or trustee *pendente lite,* respondents would *achieve the same result* by entering a stipulation upon the record that the fund would be held by them, and remain intact until a final decision upon the merits was rendered (R. p. 11a);

3—that both parties would cooperate in using this case as the vehicle for presenting the meritorious questions involving interest to the U. S. Supreme Court (R. p. 12a)—petitioners representing the stockholders' views, and respondents urging the depositors' arguments.

4—that respondents' motion to dismiss the complaint and petitioners' resistance thereto were to be treated as a final hearing, leading to a final judgment—all for the purpose of confining the issues, and obtaining a speedy determination with a minimum of expense, in order that the issues might be presented to the ap-

pellate courts as soon as possible, respondents stating that other national bank liquidations involving the same issues were awaiting the decision in this case before final distributions.

The District Court conceded that under New Jersey local law the acceptance of the full principal of a debt discharges any liability for moratory interest thereon, but further held that the facts in this case made it an *exception to the general rule.*[1] Federal, and not New Jersey law was apparently applied. The complaint was dismissed.

The order dismissing the complaint was entered November 25, 1940, *and specifically reserved all applications for costs and counsel fees* (R. p. 3a).

In accordance with the arrangement between counsel to appeal the decision, petitioners perfected an appeal to the Circuit Court of Appeals for the Third Circuit.

An opinion setting out an historical analysis of "interest", was filed, affirming the District Court in its dismissal of the complaint.[2] Again, New Jersey local law was rejected, and federal law applied.

Petitioners filed a petition for certiorari in this court. Certiorari was denied on October 13, 1941.

A petition for rehearing was promptly filed, based solely upon the importance of the national issues involved—which had been only lightly stressed in the original petition, petitioners having expected respondents to join in the prayer for the allowance of the writ. Rehearing was denied November 10, 1941.

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1 35 Fed. Supp. 260.
2 121 Fed. (2nd) 975.

Eleven days later petitioners learned of a pertinent decision recently filed.[1] That case held that in a suit by a national bank receiver against a stockholder to recover an assessment and interest, the question of whether the acceptance of the full principal destroyed the liability for moratory interest was to be governed by local Illinois law—and not by any federal common law.

On the basis of a direct conflict between the *Garvy* case in the Seventh Circuit and this case in the Third Circuit (121 Fed. 2nd 975), petitioners filed a motion in this court for leave to file a second petition for rehearing—the time to file the petition as a matter of right having expired. On December 8, 1941, the motion was granted, but the petition for re-hearing was denied.

The action of the Supreme Court in granting the motion but denying the rehearing can be reconciled on the following ground: on the very day that the foregoing rulings were filed, the decision in *American Surety* v. *Bethlehem Nat'l B'k*,[2] was announced, holding that all substantive legal questions arising under the "National Banking Act" are to be governed by federal law—and not local law—regardless of whether the question involved is *specifically* covered by the particular federal statute.

As a result, and notwithstanding the denial of certiorari in the case at bar, the meritorious questions involved herein have, for all practical purposes, been passed upon by this court. It has now been decided that the depositors' rights to moratory interest, notwithstanding the acceptance of the

[1] *Garvy, Recv'r,* v. *Wilder,* 121 Fed. (2nd) 714, 7th Circuit—Sept. 8, 1941.
[2] 314 U. S. 314.

full principal of their deposits, is a matter of federal and not local law.

In the light of the issues raised on the pending appeal it is important to bear in mind that the issue of whether federal or local law should prevail on the "interest question" cannot be said to have been definitely settled until December 8, 1941.

The merits having been disposed of, petitioners moved before the District Court for the allowance of counsel fees, their expenses in prosecuting this suit, and their taxed costs —all to be chargeable against the fund which, through petitioners' efforts, had been brought under the practical control of the court by the stipulation hereinbefore mentioned. Petitioners' application was made pursuant to the reservation contained in the order dismissing the complaint (R. p. 4a).

The District Court conceded that it had the *power* to make the allowances prayed and said:

> "The Court has usually exercised this discretion where a party through his efforts has brought a fund before the court, * * *". (R. 24a.)

That is exactly what petitioners claim to have done— "brought a fund before the court". The stipulation by respondents in open court, produced by and through the efforts of petitioners' counsel, just as effectively brought the fund under the control of the court as though a court trustee or receiver had been appointed and physically took the fund into his possession.

Then the District Court went on to say:

> "The action of the plaintiffs and the services performed by Messrs. Kristeller and Zucker are not within the theory aforesaid. *The Court reaches this conclusion reluctantly. It knows that the plaintiffs* because of double liability *contributed to and created* if not all, at least *a substantial part of the fund which would be charged and they should be saved at least part of the expense they have incurred* if it could be done without abusing our discretion.
>
> The application is denied." (R. 24a and 25a.)

An appeal was prosecuted to the Circuit Court of Appeals for the Third Circuit on the ground (a) that the district court erred in deciding the application as a matter of law, and (b) that if the court exercised its discretion, there was an abuse of discretion.

The circuit court affirmed the district court, apparently deciding the matter as a question of law rather than as one requiring the exercise of discretion. (R. 27a.)

This review is sought because the application below was not considered in accordance with the principles enunciated by this court in *Sprague* v. *Ticonic National Bank*, 307 U. S. 161.

II.

Jurisdiction.

1. The date of the judgment of the Circuit Court of Appeals for the Third Circuit to be reviewed, was July 17, 1942. The within application is made within three months after the entry of such judgment.

2. The jurisdiction of this Court to issue the writ of certiorari herein prayed for, is invoked under the Judicial Code, Sec. 240 (a) as amended by the act of February 13, 1925, 43 Stat. 938, (Title 28 U. S. C. Sec. 347).

3. *Petitioners* claim that they qualify for the allowance of costs and counsel fees chargeable to the fund in the possession of respondents since the underlying litigation was *bona fide,* meritorious, beneficial to the receivership, and fostered and invited by respondents to the end that a decision on the "interest question" be obtained from the court of last resort.

Respondents claim that since petitioners were unsuccessful in the underlying litigation, and since their efforts did not actually create a fund, that they are not entitled to charge the fund with costs and counsel fees.

4. Petitions for writs of certiorari to review decisions of the Circuit Courts of Appeal have been granted where the issue was of national importance because it involved the administration of the "National Banking Act." *Deitrich* v. *Greaney,* 309 U. S. 190.

Petitions for writs of certiorari to review decisions of the Circuit Courts of Appeal have been granted where the issue was of national importance because it involved a question of judicial administration pertaining to the exercise of general federal equity jurisdiction. *Sprague* v. *Ticonic National Bank,* 307 U. S. 161.

III.

The Questions Presented.

1. Are stockholders of a national bank in receivership, who have in good faith prosecuted litigation with the approval of the receiver and comptroller of the currency, for the sole purpose of determining the rightful ownership of the fund remaining after creditors had received 100% of the principal of their claims, entitled to costs and counsel fees out of the fund, distribution of which depended upon and was withheld pending the outcome of the suit?

2. Should the issue presented in the foregoing question —as a matter of general federal equity administration—be determined as a matter of law, or must the court consider all the equities involved before exercising its discretion?

IV.

Reasons Relied Upon for the Allowance of the Writ.

1.

The public importance of the question in the administration of the "National Banking Act."

The liquidation of national banks involves the distribution of hundreds of millions of dollars in various locations throughout the length and breadth of the United States. In determining proper ownership of such vast sums, intricate and involved questions often arise. In most instances the receiver will take the laboring oar and apply

to the courts for instructions, institute a suit for a declaratory judgment, or bring a class action to determine the rights of respective claimants.

But, frequently a receiver does not take the initiative, and judicial action is instituted by some class of claimants. Disregarding those actions which are palpably frivolous, and confining our consideration to those suits which are brought in good faith, are welcomed and fostered by the receiver as a means of solving a possibly troublesome situation, are dispositive of the questions involved, and actually relieve the class benefited from further litigation to settle the various rights, what attitude should the courts take in charging the fund with costs and counsel fees—regardless of which class prevails—if the litigation has been beneficial to the liquidation?

For example, the submission of the "interest question" in the case at bar to judicial solution was deemed sufficiently important to the Comptroller of the Currency to hold up ultimate distribution until final judgment, not only in the instant case, but in the receivership of the First National Bank of Detroit where the surplus after the payment of 100% of principal to depositors amounted to about $25,000,000.00.

Under such circumstances there ought to be adopted a definite policy by the courts as to whether the fund may be properly charged with costs. And this policy ought to be established with due regard to provisions and purposes of the "National Banking Act".

If, perchance, a troublesome issue could only be solved by judicial determination, why shouldn't the cost thereof

be chargeable to the fund regardless of at whose initiative the result is achieved? Certainly, if the receiver had sued for declaratory judgment, the fund would have borne the costs. The same result achieved at the instance of petitioners through litigation welcomed and fostered by the receiver and comptroller ought to carry the same consequences.

In any event, the issue is of sufficient importance in the administration of the "National Banking Act" to merit this court's consideration. Certiorari was allowed in *Deitrich* v. *Greaney*, 309 U. S. 190, because of the public importance of the question in the administration of the "National Banking Act".

It is submitted that the issue in the instant case is deserving of the same treatment.

2.

The importance of the question of judicial administration pertaining to the exercise of federal equity jurisdiction.

Certiorari was granted in *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, for the reason that an important question of judicial administration pertaining to federal equity jurisdiction was involved.

In the instant case a similar question of equal importance is involved.

In the *Sprague* case the underlying question was whether a fund in the possession of the defendants, (but not under the *actual* control of the court) could be charged with costs and counsel fees based upon the benefits accruing to interests similarly situated to that of the plaintiff.

In the instant case the question is whether litigation, admittedly beneficial to the receivership, warrants the allowance of costs and counsel fees from the fund to the parties prosecuting the litigation. True, in the *Sprague* case the plaintiff was successful, and in the case at bar the petitioners were unsuccessful. But nowhere in the *Sprague* opinion is it indicated that success is the *sine qua non* of an allowance. On the contrary the foot-note references are to authorities holding that allowances may properly be made to *unsuccessful* parties where a necessary rule of distribution has been established by litigation instituted by them.

It is submitted that the settlement of the federal equity question raised in the case at bar is a corollary to and just as important to the bar in general as that raised in the *Sprague* case. It can be resolved by the granting of certiorari.

3.

The Circuit Court of Appeals, in denying petitioners the allowance of costs and counsel fees as a matter of law, has decided a federal question in a way probably in conflict with applicable decisions of this court.

The decisions in the Circuit Court of Appeals below, (R. 27a) affirmed the district court upon the authority of the two cases cited therein. In so doing the court held that the district court was correct in its denial of costs and counsel fees as a matter of law.

Sprague v. *Ticonic National Bank,* (307 U. S. 161), recently decided by this court, clearly set forth the nature of the equities upon which an allowance of "solicitor-client" costs may be predicated. The actual creation of a

fund or the technical existence of a class action were held not to be essential to an allowance of costs and counsel fees if other equitable considerations warranted the allowance.

In the case at bar, the circuit court, in affirming the district court, held, in effect, that petitioners did not come within the defined classes entitled to costs and counsel fees, to wit:

> "The court has usually exercised this discretion where a party through his efforts has brought a fund before the court, prevented the dissipation of the fund or has created the fund or has in some manner conserved it, or where some other party or class will benefit by the distribution of the fund without having contributed to its successful creation or maintenance" (R. 24a).

Such action by the circuit court seems to disregard the *Sprague* case. True, petitioners were not the prevailing parties in the litigation on the merits, (as they were in the *Sprague* case) but other equities adequately supplanted that deficiency. For example, the recognition by respondents of the meritorious nature of the "interest question", the practical invitation to litigate it to the Supreme Court to settle the issue once and for all, and the voluntary stipulation to retain the fund intact until the merits were finally concluded, all furnish ample grounds for the exercise of judicial discretion in acting upon the application for costs and counsel fees, rather than for the abrupt dismissal on the ground that petitioners couldn't qualify for such costs *as a matter of law.*

The question of the allowance of costs and counsel fees is one in which the public, as well as the bar generally, is

intensely interested. An extension, limitation, or general clarification of the principles enunciated in the *Sprague* case would do much to avoid a repetition of similar litigations. The allowance of certiorari would accomplish that end.

Wherefore, your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a transcript of the record and proceedings herein; and that the judgments of the United States District Court for the District of New Jersey and the United States Circuit Court of Appeals for the Third Circuit be reversed by this Honorable Court, and your petitioners have such other and further relief in the premises as to this Honorable Court may seem just and meet.

Dated: August 25, 1942.

SAUL J. ZUCKER and
LIONEL P. KRISTELLER,
Attorneys for and of Counsel with
Petitioners.

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

JOHN F. ANDERSON,
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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Comes now Preston Delano, Comptroller of the Currency and L. M. Reed, Receiver of the New Jersey National Bank and Trust Company of Newark, New Jersey, the respondents in the above entitled case and present this their brief in opposition to the petition for writ of certiorari and in support thereof respectfully show:

A.

STATEMENT OF THE FACTS.

In February 1940, the Comptroller had paid the depositors and creditors of the insolvent New Jersey National Bank and Trust Company of Newark, New Jersey, 100 per cent of their claims pursuant to 12 U. S. C. 194, and his agent, the receiver, was proceeding with the orderly liquidation of the remaining assets which were insufficient to pay the full interest legally due the depositors and creditors. It had been settled doctrine since 1882, that the National Banking Act is a complete code by itself for the winding up of insolvent National banks. For more than sixty years the Comptroller had been paying interest on the claims of depositors and creditors of insolvent National banks, where the assets permitted, under this court's decisions in *National Bank of the Commonwealth* v. *Mechanics National Bank,* (1876) 94 U. S. 437, and *Richmond* v. *Irons,* (1887) 121 U. S. 27, and subsequent Federal Court decisions including *United States Savings Bank* v. *Morgenthau,* (1936) 85 Fed. (2nd) 811, 815, certiorari denied 299 U. S. 605, rehearing denied 301 U. S. 713. There were no decisions to the contrary. The annual reports of the Comptroller to Congress evidenced that such interest had been paid in more than four hundred National bank Receiverships. The Comptroller's practice in this connection as early as May 18, 1878, is evidenced by his letter of that date to the Receiver of the insolvent Commercial National Bank of Kansas City, Missouri (Appendix Page 10) which was appended to the Receiver's brief in the court below.

The present attorney for the petitioners visited the Office of the Comptroller on February 28, 1940, to demand that the remaining assets of the bank be surrendered to the shareholders, pursuant to 12 U. S. C. 197, without payment of any interest to depositors and creditors, on the ground that the law of New Jersey controlled the question since *Erie Railroad* v. *Tompkins,* (1938) 304 U. S. 64 and that the State law did not permit the payment of such interest under the cir-

cumstances of this case. After a general discussion of the law, during which the attorneys for the Comptroller referred to this court's decision in *Deitrick* v. *Greaney*, decided February 12, 1940, (309 U. S. 190) the attorney for the petitioners was advised that the demand would be considered.

On March 2, 1940 the petitioners' complaint was filed in the United States District Court (R. 48 in *Stein* v. *Delano*, No. 358, October Term, 1940, of this court, hereafter referred to as the basic suit). The complaint prayed that the Comptroller and the Receiver be enjoined from further retaining possession of the assets of the bank and from winding up its affairs and that a court Receiver be appointed to take possession of the assets. The complaint alleged (Basic R. 51):

> "Defendant Comptroller has refused to call a meeting of the shareholders of said association for the purposes mentioned in the preceding paragraph, in order that the assets now in the possession of the defendants might be paid over to said shareholders or their legal representatives in proportion to the stock by them respectively held; and *notwithstanding formal, written demand therefor has been made upon the office of the said Comptroller, the defendants insist upon their alleged right to continue in possession* of the assets of said association and to wind up its affairs *for the sole purpose of paying to the former creditors of said association interest upon their respective claims.*
>
> * * * * * *
>
> "*Unless this Court intervenes and enjoins said defendants* from continuing in possession of the assets of said association for the purpose of winding up its affairs and paying interest to the former creditors thereof upon their respective claims, *defendants, in accordance with their expressed intentions, will make such payments of interest from time to time*, and the recovery back from said various payees by the shareholders of said association will involve a multiplicity of suits and the expenditure of tremendous sums of money, all to the irreparable damage of plaintiffs, the association, and all the other shareholders thereof." (Italics ours.)

B.

DISCUSSION.

We submit that the petition for certiorari presents no valid ground for a review by this court. No question of public importance in the administration of the National Banking Act or of judicial administration pertaining to Federal equity jurisdiction is involved. We submit that the decision of the court below on the Federal question involved is in complete accord with, rather than in conflict with, the applicable decisions of this court.

The rule stated in this court's opinion in *Hobbs* v. *McLean*, (1886) 117 U. S. 567, 582, relied on with *First National Bank of Atlanta* v. *Southern Cotton Oil Co.*, (C. C. A. 5, 1936) 86 Fed. (2nd) 33, by the court below for its *per curiam* affirmance of the District Court's decision, appears to control this case:

> "When many persons have a common interest in a trust property or fund, and one of them, for the benefit of all and at his own cost and expense, brings a suit for its preservation or administration, the court of equity in which the suit is brought will order that the plaintiff be reimbursed his outlay from the property of the trust, or by proportional contribution from those who accept the benefits of his efforts. See *Trustees* v. *Greenough*, 105 U. S. 527, where the subject is discussed by Mr. Justice Bradley, and the cases cited; and *Central Railroad Co.* v. *Pettus*, 113 U. S. 116. *But where one brings adversary proceedings to take the possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, it has never been held, in any case brought to our notice, that such person had any right to demand reimbursement of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate.*" (Italics ours.)

The petitioners, without invitation or suggestion from any representative of the depositors, filed the basic adversary proceeding to take possession of a fund held in trust by the

Comptroller of the Currency for those legally entitled to it (the depositors) in order that the fund might be distributed to those who claimed adversely (the stockholders). That attempt failed. Now petitioners who tried in vain to take that fund from the depositors are demanding reimbursement of their expenses out of the fund and a contribution from those whose property they "sought to misappropriate."

After this adversary proceeding was filed the representatives of the depositors co-operated, as in any other suit, looking toward limiting the issues, to minimize expense to depositors, and the avoidance of interference with the orderly liquidation. The decision of the attorney for the petitioners to limit the issue to the interest question was made only after he was advised that interference with the liquidation by the Comptroller's Receiver would be vigorously opposed, that a large bond would be sought to save the depositors against loss and after his attention was invited to the decision in *Port Newark National Bank* v. *Waldron,* (C. C. A. 3, 1930) 46 Fed. (2nd) 296, wherein the court below directed this District Court to oust its Receiver and restore control to the Comptroller's Receiver.

Petitioners refer to their action as "welcomed and fostered" by the Comptroller and Receiver. That the litigation was distinctly hostile is clearly evidenced by the complaint and particularly by the relief sought. The attorney for the petitioners, states in his affidavit filed in the court below (R. 7a), that he was examining the law as early as November 1939, and that various drafts of the proposed complaint were prepared. The Comptroller had no notice of the intention of the petitioners to sue until February 28, 1940, and suit was filed on March 2, 1940. Actually suit was filed before the Comptroller had an opportunity to formally reject the demand. (Comptroller's letter to petitioners' attorney dated March 1, 1940, Appendix page 11) Prior to the filing of the instant basic suit these petitioners had filed two suits against the Receiver (R. 22a), incident to their

vigorous resistance against payment of their large note and stock assessment obligations ultimately compromised for a small percentage of the amount due. (R. 23a.) The petitioners, through their present attorney, later attempted to interfere with the liquidation by seeking an order restraining the auction sale of remaining assets which was denied April 7, 1940. (R. 23a.)

The Comptroller considered the law settled at the time the instant suit was filed. This view was affirmed by the District Court and by the court below when it said in *Stein* v. *Delano,* (C. C. A. 3, 1941) 121 Fed. (2nd) 975, 978, "For the law is well settled and is with the Comptroller." Thereafter, the petitioners were unable to convince this court that a review should be granted in a certiorari petition and in two petitions for rehearing. In *Deitrick* v. *Greaney,* cited to the petitioners' attorney before the instant basic suit was filed this court said, 309 U. S. 190, 200:

> "A point much discussed in brief and argument, upon the assumption that local law will guide our decision, see Erie R. Co. v. Tompkins, 304 U. S. 64, is whether, by Massachusetts law respondent is precluded from setting up the illegality of the transaction as a defense to his note. But it is the federal statute which condemns as unlawful respondent's acts. The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted, see Board of County Commissioners of Jackson County v. United States, 308 U. S. 343, and cases cited. We have recently held that the judicial determination of the legal consequences which flow from acts condemned as unlawful by the National Bank Act involves decision of a federal, not a state question. Awotin v. Atlas Exchange National Bank, supra."

Certainly, the Comptroller and the Receiver had no good reason for welcoming or fostering additional litigation with these petitioners.

Respondents deny that the discussion on pages 5 and 6 of the petition fairly represents the arrangement between counsel prior to the hearing in the District Court. Respondents also deny the following statements at pages 6 and 12 of the petition:

> "* * * respondents stating that other National bank liquidations involving the same issues were awaiting the decision in this case before final distributions."
>
> * * * * * *
>
> "For example, the submission of the 'interest question' in the case at bar to judicial solution was deemed sufficiently important to the Comptroller of the Currency to hold up ultimate distribution until final judgment, not only in the instant case, but in the receivership of the First National Bank of Detroit where the surplus after the payment of 100% of principal to depositors amounted to about $25,000,000.00."

The Comptroller was not withholding payment of interest to the depositors of any insolvent bank when the instant basic suit was filed and he has not withheld the payment of such interest to the depositors of the First National Bank-Detroit or to the depositors of any other bank since this suit was filed. As a matter of fact no money is yet available to pay interest to the depositors of the First National Bank-Detroit because all of the proceeds of its assets are still being applied in reduction of the loan obtained thereon to pay the last dividend which made a total of 100 per cent on principal. To quote from page 2 of the Brief of Respondent in opposition to the petition for rehearing, No. 358, in this court, October, 1941:

> "2. Petitioner's statements, pages 2, 4 and 5 of the rehearing petition, that distribution of interest to depositors of other insolvent National banks is being withheld or has been withheld pending a final decision in the instant case are based on erroneous information. Interest dividends in addition to 100% principal have been paid the depositors of the following insolvent National banks by the Comptroller of the Currency since

March 2, 1940, the date the complaint was filed in the instant case:

First National Bank & Trust Company, Fleetwood, Pennsylvania
The National Bank of Bellows Falls, Vermont
The First National Bank of Pender, Nebraska
The First National Bank of Birdsboro, Pennsylvania
The Cumberland National Bank of Fayetteville, North Carolina
The National Bank of Windsor, Vermont
Northeast Savings Bank of Washington, D. C.
The First Inland National Bank, Pendleton, Oregon
The Peckville National Bank, Peckville, Pennsylvania
The First National Bank of Honaker, Virginia
The First National Bank of Paw Paw, Michigan
The County National Bank of Clearfield, Pennsylvania
First National Bank of Saegertown, Pennsylvania
The Bank of Pittsburgh, N.A., Pittsburgh, Pennsylvania
Farmers & First National Bank of New Castle, Indiana
California National Bank of Sacramento, California
The First National Bank of Marshall County at Plymouth, Indiana
The First National Bank of Burlingame, Kansas
The Essex National Bank of Haverhill, Massachusetts
The First National Bank in Salem, Oregon
The Citizens National Bank of Irwin, Pennsylvania."

The petitioners obtain no assistance from this court's decision in *Sprague* v. *Ticonic National Bank,* (1939) 307 U. S. 161, and the proceedings thereunder. There the successful petitioner was awarded his attorneys expenses out of earmarked funds held by the Receiver against which the petitioner had established a lien and thereby through the principle of *stare decisis* established like rights for other beneficiaries not parties to the suit. Here the petitioners failed in their effort to misappropriate the funds of an insolvent bank's depositors, which funds the petitioners had caused to be diminished by the payment of attorney fees and other expenses necessary to the successful defense. Also the litigation prevented the payment of an interim interest

dividend which will now be included in the final dividend. We submit that the action of the District Court here complained of was an exercise of its discretion within legal rules established by this court's decisions and that its action and the *per curiam* affirmance by the court below were plainly right.

C.

CONCLUSION.

It is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

JOHN F. ANDERSON,
Counsel for Respondents.

APPENDIX.

COPY

Treasury Department,
G.W.M. Office Comptr. Currency.

May 18th 1878

Sir:

I have received your letter of the 13th inst. with draft on Importers & Traders Natl. Bank New York for Seven Thousand Dollars. Also your letter of the 15th inst. with drafts as stated amounting to $2,731.04. I have also received per Express One Thousand Dollars in currency advised in your letter of the 14th instant.

I have deposited these several amounts with the Treasurer U. S. for the benefit of the creditors of the Commercial Natl. Bank of Kansas City, Mo.

Your statement of account agrees with the books of this office with the following exceptions. At the time of the failure of the bank there was on deposit in the 5% fund only $1250 $500 of their circulating notes having been redeemed by the Treasurer and sent to this Office and destroyed leaving outstanding circulation to be provided for $44,500 instead of $45,000 the original amount.

Of this $1250 the Treasurer transferred $492 to my credit for benefit of the creditors of the bank and has retained $758 for semi-annual duty on deposits circulation and capital stock, but has not yet been settled or allowed by me.

I have also paid $7.11 for Telegraph bills. There will now be sufficient to pay the 25% remaining due upon claims as suggested by you.

A recent decision of the Supreme Court allows creditors of insolvent banks interest upon their claims. Presuming that before this dividend could be paid you would collect enough to cover this interest I have thought best to make the final dividend to include the interest as well as the 25% due upon the original claim. I have therefore telegraphed you—"compute interest on claims from date of proof and make checks for balance due". You will understand that the interest is to be computed at the legal rate, and is to be allowed upon the whole amount of the claim from date of proof up to the declaration of the 75% dividend, and upon the balance of 25% from the date of that dividend to the final payment.

You also enclose in your letter of the 15th the following dividend checks viz:

No. 33918 for 453.78
33993 " 21
33916 " 57 $531.78

the claims having been allowed as offsets. I have canceled these checks and return them herewith to be affixed in check book with explanation.

Very respectfully,

JNO JAY KNOX
Comptroller

H. B. Cullum, Esq., Recr.
Commercial Natl. Bk.
Kansas City, Mo.

M.C.
Mc.C.

March 1, 1940

Mr. Saul J. Zucker
Kristeller & Zucker
744 Broad Street
Newark, New Jersey.

Dear Sir: Refer to CC-LD

Acknowledgment is made that on February 28, 1940, you served upon this office a "Demand" dated February 27, 1940, signed by Wm. B. Stein, describing himself as "a shareholder of the New Jersey National Bank and Trust Company of Newark, New Jersey, acting for himself, the Association, and the other stockholders thereof", and addressed to the Comptroller of the Currency, reciting that payment in full of the principal of claims against the New Jersey National Bank and Trust Company, in receivership, has been made or provided for, and demanding (1) that the Comptroller immediately call a meeting of shareholders of the Bank pursuant to Sec. 3 of the Act of June 30, 1876, 19 Stat. 63, as amended (U.S.C. Title 12, Sec. 197) and (2) that pending the meeting, the Comptroller direct the Receiver of the Bank to cease immediately from taking any further action in connection with the estate of the Bank, or from incurring any additional expense to the estate.

The Demand is being given consideration.

Very truly yours,

(Signed) C. B. UPHAM,
Deputy Comptroller.

EA:ej 2/29/40